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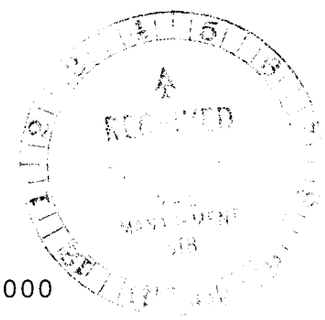

November 17, 2000

VIA HAND DELIVERY - RETURN COPY

Hon. Vernon A. Williams
Secretary
Case Control Unit
Attn: STB Ex Parte No. 582 (Sub-No. 1)
Surface Transportation Board
1925 K Street, NW (7th fl.)
Washington, DC 20423-0001

Dear Secretary Williams:

Enclosed for filing in STB Ex Parte No. 582 (Sub-No. 1), Major Rail Consolidation Procedures, are the original and twenty-five copies of the Comments of Texas Crushed Stone Company and commonly controlled Georgetown Railroad Company (TCS-1).

Also enclosed is a 3.5 inch IBM-compatible diskette convertible into WordPerfect 9.0 format with the text of the Comments.

Additional copies of this letter and of the Comments are enclosed for you to stamp to acknowledge your receipt of them and to return to me via the messenger.

If you have any question concerning this filing which you believe I may be able to answer or if I otherwise can be of assistance, please let me know.

Sincerely yours,

Fritz R. Kahn

enc.
cc: Service list
Mr. William B. Snead

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ORIGINAL

TCS-1

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, DC

STB Ex Parte No. 582 (Sub-No. 1)

MAJOR RAIL CONSOLIDATION PROCEDURES

COMMENTS
OF
TEXAS CRUSHED STONE COMPANY
and GEORGETOWN RAILROAD COMPANY

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Attorney for

TEXAS CRUSHED STONE COMPANY
And GEORGETOWN RAILROAD COMPANY

Due and dated: November 17, 200

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C.

STB Ex Parte No. 582 (Sub-No. 1)

MAJOR RAIL CONSOLIDATION PROCEDURES

COMMENTS
OF
TEXAS CRUSHED STONE COMPANY
and GEORGETOWN RAILROAD COMPANY

Texas Crushed Stone Company ("TCS") and the commonly controlled Georgetown Railroad Company ("GRR"), of Georgetown, Texas, pursuant to 5 U.S.C. 553(c) and 49 C.F.R. 1110.1, et seq., offer the following comments pertaining to the rules proposed for adoption by the Board's Notice of Proposed Rulemaking, served October 3, 2000:

TCS opened its quarry near Georgetown, Texas, in 1958, with the intent of using railroad transportation to serve the crushed stone markets along the Gulf Coast and in east Texas. The Georgetown quarry is located on the GRR, a short line railroad affording access to the lines of the Class I railroads traversing central Texas. Over the years, TCS has tendered over 1.25 million carloads of crushed stone to the railroads. At the time when TCS opened its Georgetown quarry, the Class I railroads in the area were the Missouri Pacific Railroad Company ("MoPac") and

the Missouri-Kansas-Texas Railroad Company ("Katy").

Subsequently, the MoPac was acquired by the Union Pacific Transportation Company ("UP")[1], and, only a few years later, UP acquired the Katy.[2] The loss of rail-to-rail or intramodal competition between the UP and the Katy was sufficiently disturbing to TCS and GRR that TCS undertook a significant legal effort and had GRR file a responsive application seeking trackage rights over the UP to be able to reach TCS's customers in the Houston area. 4 I.C.C.2d at 466. UP, however, reached an agreement with the Southern Pacific Transportation Company ("SP") whereby UP granted SP trackage rights over its lines between the connection with GRR at Kerr and Hearne and Bryan on the lines of the SP. 4 I.C.C.2d at 480. The trackage rights agreement was found to be reasonable and was imposed as a condition to the transaction's approval. 4 I.C.C.2d at 525.

Thereafter, when UP acquired the SP,[3] TCS was recognized as being a two-for-one shipper, and GRR, a two-for-one short line railroad within the meaning of the agreement between UP and The Burlington Northern and Santa Fe Railway Company, which, as modified, was imposed as a condition by decision of the Board. 1

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[1] Union Pacific--Control--Missouri Pacific; Western Pacific, 366 I.C.C. 462 (1982), aff'd in part and remanded, Southern Pacific Transp. Co. v. I.C.C., 736 F.2d 708 (D.C. Cir. 1984), cert. den., 469 U.S. 1208 (1985).

[2] Union Pacific Corp., et al.--Cont.--M)-KS-TX Co., et al., 4 I.C.C.2d 409 (1988)

[3] Union Pacific/Southern Pacific Merger, 1 S.T.B. 233 (1996), aff'd, Western Coal Traffic League v. Surface Transp. Bd., 169 F.3d 775 (D.C. Cir. 1999).

S.T.B. at 419.

The Board's understanding of the importance to TCS and GRR of preserving rail-to-rail or intramodal competition and the agency's imposition of conditions designed to safeguard that GRR will be able to connect with and TCS's shipments transported by two Class I railroads are greatly appreciated.

Even with access to two Class I railroads, TCS has not fared all that well. In 1979, TCS shipped 55,000 carloads of crushed stone, and GRR was able to maintain rates competitive with other Texas quarries serving common Gulf Coast and east Texas markets. In the meantime, the demand for crushed stone in those markets has tripled, but TCS has been able to ship only 30,613 carloads of crushed stone within the past twelve months; the rates of GRR and its connections no longer are competitive to many of the points heretofore served.

Crushed stone is a short-haul commodity, not nearly as attractive to the railroads as almost all other freight they handle. The railroads' rates on crushed stone, however, are relatively high in the sense that the railroad rates are a major component of the delivered price of the product. The railroads are free to set their rates on crushed stone wherever they wish, because the rail transportation of crushed stone has been exempted from regulation.[4] That places a shipper of crushed stone, such as TCS, is an untenable position, for the railroads

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[4] Rail Exemption--Transp. of Selected Commodity Groups, 9 I.C.C.2d 969 (1993).

are free to dictate the terms of their handling of its products on a take it or leave it position. TCS is wholly without recourse in protecting itself from the railroads' pricing practices.

That is why competition is of such great concern to TCS and GRR. To be sure, some of the output of the Georgetown quarry is trucked, but rail transportation remains the mainstay of TCS's ability to market is product. TCS has been able to retain access to two Class I railroads in the past mergers, as we already have acknowledge. TCS and GRR, however, are concerned about future railroad mergers and acquisitions, and, therefore, we attach such great importance to the proper formulation of the proposed major merger rules.

In reading the Board's perception of the public interest considerations, as set forth in proposed §1180.1(c) and its weighing of the potential benefits, proposed §1180.1(c)(1), and potential harm, proposed §1180.1(c)(2), in a major railroad merger or acquisition proceeding, we almost feel as if the Board were altogether too narrow in its focus.

We do not doubt that there are economic benefits and financial gains that the Class I railroads can achieve by their mergers or acquisitions of control. TCS has made significant investments in the railroads upon which it is dependant, not only GRR but also UP and BNSF. As stockholders in the railroads which have been in the forefront of the consolidation movement over the past couple of decades, however, we have seen little

evidence that these alleged benefits have inured to the railroads' owners. To the contrary, the stock prices of the surviving railroads have not kept apace with those in other industries. Indeed, a recent study[5] confirms that "the stockholders of acquiring firms do not gain from merger." Yet, the Board's proposed major merger rules do not mention the railroads' stockholders, and they certainly do not identify the adverse effect upon the value of the shares of the acquiring railroad as a potential harm of the proposed transaction.

Major railroad mergers and acquisitions all too often have resulted in the loss of middle management personnel. Shippers, such TCS, no longer can call on the knowledgeable and interested representatives of the railroads whom they have come to know and trust. Indeed, it sometimes is a mystery just who are the principal beneficiaries of the economic benefits and financial gains that the proposed transactions were intended to achieve.

As shippers on Class I railroads, we also have seen little or no reduction in their rates owing to the economic benefits and financial gains which their mergers or acquisitions were intended to bring about. To be sure, the industry can point to stabilized or even reduced average railroad rates; however, these have come about through the Class I railroads' abandonments or sales or leases to short line operators of marginal properties and the significant changes which have been effected in the employees'

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[5] Huey-Lian Sun and Alex P. Tang, "The Sources of Railroad Merger Gains: Evidence fro Stock Price Reaction and Operating Performance," Transportation Journal, Summer 2000.

work rules. Again, the Board's proposed major merger rules do not mention rates, and they certainly do not identify the failure of the Class I railroads to share the alleged benefits of their mergers or acquisitions with the shippers on their lines as a potential harm of their proposed transactions.

The real potential harm of any additional major mergers or acquisitions is that they will further remove the railroads from their customers. As most shippers in the area will agree, TCS felt much closer to the MoPac and the Katy than it has to their successor companies; with the former, shippers felt they had someone that understood their needs and sought to satisfy them, but, with the latter, the shippers all too often feel alienated, as if they just don't count. While the Board's proposed major merger rules are insistent that essential railroad service shall be preserved, as, for example, at proposed §1180.1(c)(2)(ii), that means relatively little to ordinary shippers. We do not doubt that utilities which receive weekly unit-trainloads of coal from the Southern Powder River Basin or United Parcel service which daily tenders unit-trainloads of intermodal freight command the attention of the railroads. What most shippers want is the same sort of attentive railroad service, railroad service that is consistent and reliable and railroad service that is responsive to their needs. It was one thing when TCS's Georgetown quarry was one of only two quarries in the area served by the Katy; TCS's traffic is of far lesser importance when it's quarry simply is one of 15 quarries served by the UP. The Board's proposed

major merger rules, however, fail to identify the increased remoteness of the merged or acquired railroad as yet another potential harm of future transaction proposals.

Not unrelated to that concern is the inevitability that as additional major mergers or acquisitions occur, the need for some measure of reregulation of the railroads will become inevitable. The two trends, consolidation of the industry, on the one hand, and, on the other, its substantial deregulation, are incompatible. If the Nation is going to be served by two or even one major railroad, some supervision of rates and services will need to be reenacted.

The enactment of remedial legislation, which is anathema to the industry, can be postponed, if not avoided altogether, if only the Class I railroads were to realize that they need to treat their short line connections as partners and not as rivals. When TCS started in business in 1958, there were relatively few short line railroads. Today 29 percent of the U.S. rail system is operated by short line or regional railroads. The short line railroads through their trade association, the American Short Line and Regional Railroad Association, proposed specific provisions to be written into the Board's major merger rules: however, as promulgated, none of its recommended language was included. The best the Board seemed to be able to do was to insert a parenthetical reference to Class II and Class III railroads when referring to the rail network as a whole, as, for example in proposed §1180.1(c)(2)(ii) and §1180.1(d). We just

don't believe that will do.

We simply do not believe that the Board in considering any future major railroad mergers or acquisitions can ignore the important role that short line railroads potentially can play in preserving what little rail-to-rail competition remains and, more importantly, in enhancing intramodal competition, as the Board insists is one its goals in promulgating the proposed rules. Neither do we believe that the Board can be oblivious to the fact that the Class I railroads deal with their short line connections to suit their own self interests and that, if short line railroads are to be able to play a meaningful role in preserving, and much less enhancing, competition, the merger rules must provide for express conditions to be attached to any approvals of future major merger or acquisition proposals. In our view, the Board would have been well advised to have promulgated the proposed rules designed to safeguard the ability of short line railroads to assist in the preservation and enhancement of intramodal competition, namely:

> (1) Class II and Class III railroads that connect to the merged or consolidated and consolidating carriers have the right to compensation by the railroads for service failures related to the merger or consolidation. In addition, when the merged or consolidated and consolidating carriers cannot provide an acceptable level of service post-transaction, connection Class II and Class III railroads should be allowed to perform additional services as

necessary to provide acceptable service to shippers.

(2) Class II and Class III railroads have the right to interchange and routing freedom. Contractual barriers affecting Class II and Class III railroads that connect with the merged or consolidated and consolidating carriers that prohibit or disadvantage full interchange rights, competitive routes and/or rates must be immediately removed by the carriers, and none imposed in the future. The merged or consolidated and consolidating carriers must maintain competitive joint rates through existing gateways. Also, Class II and Class III railroads should be free to interchange with all other carriers in a terminal area without pricing or operational disadvantage. Any pricing or operational restrictions which disadvantage connecting Class II or Class III railroads must be immediately removed by the merged or consolidated and consolidating carriers, and none imposed in the future.

(3) Class II and Class II railroads that connect to the merged or consolidated and consolidating carriers have the right to competitive and nondiscriminatory rates and pricing. Rates and pricing of the carriers that do not meet this standard will be promptly corrected by the merged or consolidated and consolidating carriers upon request by a connecting Class II or Class III railroad.

(4) Class II and Class III railroads that connect to the merged or consolidated or consolidating carriers have the right to fair and nondiscriminatory car supply. Car supply issues regarding this standard will be promptly addressed by the consolidated carrier upon request by a connecting Class II or Class III railroad.

The Board should encourage the applicants to implement the foregoing conditions by negotiation with the Class II or Class III railroad connections in a mutually agreeable fashion without the need for coming to the Board for interpretation of the conditions or their enforcement. If, however, enforcement of the conditions were needed, the Board should have in place a mechanism whereby an expedited and cost-effective remedy can be pursued by a Class II or Class III railroad filing a complaint with the Board.

The railroads of the Nation are critical in carrying on its commerce. While trucking has gained an ever increasing share of the freight being transported, there is a limit to the numbers of highways that can be built and the traffic the truckers can handle. The railroads must be able at least to hold on to and perhaps even regain traffic. The next round of major railroad mergers should serve that goal and not, as in our judgment, some of the transactions of the past have done, defeat it.

In considering what is in the public interest in passing on future mergers and acquisitions the Board should answer questions, such as the following: Will the merged or

consolidated and consolidating railroads create new and productive jobs within the industry? Do existing rail customers support the proposed transaction? Will the proposed transaction result in more rail-to-rail or intramodal competition and, hence, in better service and lower freight rates? Will the proposed merger or consolidation result in new customers using rail transportation? Will more small businesses be able to use the railroads to fulfil their transportation needs? Is the proposed transaction likely to increase the stock value of the merged or consolidating company? Will the proposed transaction help the short line and regional railroads which are affected? Do the involved short line and regional railroads support the merger or consolidation? Will the loss of prospective customers reduce the viability and economic health of the companies which sell goods and services to the railroad industries?

In the United States, we have had a great deal of experience with major railroad mergers over the past twenty years. An objective, outside study would show the likely impact of future transactions on the people who depend on the railroads for sale, employment or to move their products. Future mergers and acquisitions should not be approved unless they clearly benefit and support those who have a stake in the proposed transactions--the senior officers of the railroads, the railroads' employees, existing rail customers, the merged or acquiring railroads' stockholders, connecting short line and regional railroads and rail equipment suppliers.

In sum, we believe that the proposed rules for major railroad consolidations are far too vaguely worded, do little to correct the decidedly pro-merger bent of the Board and offer shippers, such as Texas Crushed Stone Company, and short line railroads, such as Georgetown Railroad Company, little in the way of reliable safeguards to preserve, much less enhance, railroad competition.

Respectfully submitted,

TEXAS CRUSHED STONE COMPANY
GEORGETOWN RAILROAD COMPANY

By their attorney:

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Tel.: (202) 263-4152

Due and dated: November 17, 2000

CERTIFICATE OF SERVICE

I certify that I this day have served copies of the foregoing pleading upon counsel for each of the parties by mailing them copies thereof, with first-class postage prepaid.

Dated at Washington, DC, this 17th day of November 2000.

Fritz R. Kahn